

REEXAMINATION OF THE PROCEDURAL ASPECTS OF THE STATUTE OF LIMITATIONS

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Almost thirty years ago, at the conclusion of a study of the pleading and procedural aspects of the statute of limitations,¹ the writer set forth a brief summary of his position as follows:

1. The New York method of asserting the bar of the statute of limitations by motion at a preliminary stage of the action is the most efficient method yet to appear.

2. As a first alternative to the above, the demurrer, preferably the special demurrer, should be permitted to raise the point in all possible cases. To this end the plaintiff should be obliged to bring himself within any exception upon which he relies, either in the original or amended complaint.

3. In the cases in which the foregoing devices cannot be used and generally in the jurisdictions which refuse to use them, the bar of the statute should be raised specially in the plea or answer.

4. A defendant should not be permitted to raise the defense of limitation of time under the general issue or general denial. This would seem desirable even in those cases in which he relies upon title by adverse possession or a special limitation of a statutory action. All time limitations should have as far as possible the same procedural treatment.

5. It seems sound to consider that the defense is waived unless presented by one of the first three above alternative means. Amendments asserting the defense at a late stage of the proceeding should be allowed only under special circumstances.²

Revisiting the subject in 1955 involves something more than putting one's attention to the specific developments of the last three decades. Initially the difference in the procedural climate of the 1920's and the 1950's must be noticed. Of course the Federal Rules, with their emphasis upon simplicity and efficiency in the progress of the lawsuit without throwing overboard all of the procedural tradition accumulated over the centuries, are the chief factors in this change. They have marked a new era in the field of adjective law, not only in the federal courts but in the several state jurisdictions where identical or similar rules have been adopted. It is with a sense of satisfaction that the writer observes that the Federal Rules and the state procedures which have followed the Rules

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¹ *Allegations of Time in Pleading*, 35 YALE L.J. 487 (1926); *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. (1927); *Pleading the Statute of Limitations*, 36 YALE L.J. 914 (1927). The last article is hereafter cited as *Pleading*.

² *Pleading*, *supra* note 1, at 948.

have adopted most of his specific propositions relative to the pleading of time limitations.³

Another important procedural development in the present connection is the adoption and utilization of summary judgment procedures in the federal and state systems. Summary judgment, in its infancy in America at the time of the earlier articles, has now become a significant part of the speeding up of the administration of justice.⁴ That it has marked pertinency in the raising of the defense of the statute of limitations will be immediately apparent.⁵

More general and more unmeasurable than either of these two considerations is the fact that in recent years the bench and bar have been less inclined to be technical in matters of procedure—particularly in pleading. Quite independent of specific changes in procedural devices, there is a somewhat different professional attitude toward the adjective law. It is a common sense point of view⁶ which tends to move the focus closer to the goals for which the writer, among many others, expressed desire and hope.

Since the problems connected with adverse possession and with time limitations fixed by the very statute which creates the right present special problems, it is proposed to treat them separately after the various procedural aspects of the general statute of limitations have been discussed.

THE GENERAL STATUTE OF LIMITATIONS

(1) *Allegations of Time*

Specification of when the events took place is a natural and almost inevitable part of any form of the narrative process. Even the fairy stories begin: "Once upon a time." While no paraphrase of the mandate of Stephen⁷ that "the pleadings must allege the *time*; that is, the day, month, and year when each traversable fact occurred" can be found in the Federal Rules, the Rules do contemplate time allegations⁸ and the forms appended to the Rules show this by way of example.⁹ Even if the Rules were deemed to authorize the type of notice-pleading which does not require allegation of the elements of the claim, the relevant dates would be a part of the necessary minimum statement.¹⁰

Despite the fact that under the present federal procedure information to supplement the complaint can usually be obtained only through the

³ See Federal Rules of Civil Procedure, 1937 (hereafter cited as FED. R. CIV. P.) 8(c), 9(f) and *infra* text at notes 8-10, 34-39, 43-45, 64.

⁴ See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 219-220 (1949).

⁵ See *infra* text at note 45 and following.

⁶ See *e.g.* Hitchcock v. Union & New Haven Trust Co., 134 Conn. 246, 56 A.2d 655 (1947).

⁷ STEPHEN, PLEADING (Tyler ed. 1898).

⁸ See FED. R. CIV. P. 9(f); Rich v. Kehler and Ingalzo, 47 Sch. L.R. 163 (Pa. C.P. 1950) applying a state court rule.

⁹ In particular, see Forms 3, 6 to 18.

¹⁰ See Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 502-505 (1918).

discovery process, the courts have shown a willingness to require more particularization of the pleadings when there is a deficiency of time allegations.¹¹ A similar attitude is manifest in recent state cases.¹² While day, month and year is the normal requirement of specificity, "on or about" is sometimes permissible,¹³ although some decisions require statement of the hour as well as the date.¹⁴ These departures from the rule of thumb are not indications of either laxity or strictness of the court, but simply show that less or greater particularity is reasonable in the circumstances of the particular case.

Time allegations serve principally a notice-giving function. In most cases time is "immaterial" and issue cannot be taken thereon.¹⁵ Proof of a different date from the one alleged is not normally a fatal variance,¹⁶

¹¹ *Klein v. Debway Hats, Inc.*, 2 F.R.D. 356 (S.D. N.Y. 1942); *Downey v. Banker*, 1 F.R.D. 123 (S.D. N.Y. 1940) (bill of particulars); *Forstmann v. Wenner-Gren*, 1 F.R.D. 775 (S.D. N.Y. 1941); see also notes 14, 19 *infra*. But *cf.* *Clark Door Co. v. Yeager*, 1 F.R.D. 770 (M.D. Pa. 1941).

¹² *Industrial Sav. Bank v. Greenwald*, 229 Ala. 529, 158 So. 734 (1935); *Owings v. Dayhoff*, 159 Md. 403, 151 Atl. 240 (1930); *McKay v. New York Life Ins. Co.*, 142 Me. 296, 50 A.2d 914 (1947) (special demurrer); *cf.* *Tilden Lumber & Mill Co. v. Bacon Land Co.*, 116 Cal. App. 689, 3 P.2d 350 (1931) (note set forth in pleading adequately showed maturity date); *Tiller v. Cincinnati Discount Co.*, 270 Ky. 685, 110 S.W. 2d 420 (1937) (usury—discovery); *Hunt v. National Linen Service Corporation*, 178 Tenn. 262, 157 S.W. 2d 608 (1941); *Miller v. Brown*, 107 Cal. App. 2d 304, 237 P.2d 320 (1951) (special demurrer sustained for uncertainty of time).

¹³ *Parker v. Transcontinental & Western Air*, 4 F.R.D. 325 (W.D. Mo. 1944); *Handschumaker v. Belan*, 12 Fay. L.J. 34 (Pa. C.P. 1949); *Meyers v. Price*, 247 S.W. 2d 574 (Tex. Civ. App. 1952); see also *Phillips v. Ashworth*, 220 Ala. 237, 124 So. 519 (1929) (seduction in "summer or fall of 1926," sufficient); *Scott v. City of Marshall*, 223 Mo. App. 596, 14 S.W. 2d 694 (1929) (flooding at given date and other numerous times, sufficient); *Vanderhoef v. Parker Bros. Co.*, 267 Mich. 672, 255 N.W. 449 (1934) (services rendered between specified dates, sufficient). *Cf.* *Greninger v. Fischer*, 81 Cal. App. 2d 549, 184 P.2d 694 (1947) ("on or about" allegation prevented possible disposition of the case upon demurrer).

¹⁴ *Guerin v. Portland Trawling Co.*, 1 F.R.D. 64 (D. Mass. 1939); *Missouri Pac. R. Co. v. Berry*, 180 Ark. 437, 21 S.W. 2d 601 (1929) (dog killed about 11 o'clock in the forenoon, sufficient).

¹⁵ See cases holding that a literal denial of an allegation that an act was done on a certain day is a negative pregnant and amounts to an admission that it was done on another day. *Hess v. Sausser*, 206 Cal. 15, 272 Pac. 1059 (1928); *Williams v. Kosek*, 33 Luzerne Leg. Reg. Repts. 242 (Pa. C.P. 1939); see also *Fagerstrom v. Rappaport*, 176 Minn. 254, 223 N.W. 142 (1929).

¹⁶ *Swedman v. Standard Oil Co.*, 12 La. App. 359, 125 So. 481 (1929); *Horton v. Industrial Commission*, 88 Utah 306, 54 P. 2d 249 (1936); *Rygiel v. Kanengieser*, 114 N.J.L. 311, 176 Atl. 605 (1935) (although no *videlicet*). See also *Independent Life Ins. Co. v. Vann*, 24 Ala. App. 72, 130 So. 520 (1930) (if there is a *videlicet*); *Cable v. United States*, 104 F. 2d 541 (7th Cir. 1939) (same—Illinois law—limited to proof of date within limitation period); *Hitchcock v. Union & New Haven Trust Co.*, 134 Conn. 246, 56 A. 2d 655 (1947); *Atchley v. Wood*, 255 Ala. 227, 51 So. 2d 705 (1951) ("on or about"). Variance between dates of adultery alleged and proved was deemed cured by amendment to conform with proofs in *Collins v. Collins*,

although a recent Alabama case harks back to earlier days by limiting this to cases where the time was alleged under a *videlicet*.¹⁷ Traits of honesty and accuracy at the bar will usually result in a statement of the true dates; the slippery or the careless pleader may be penalized by the imposition of costs of a continuance if the opponent is surprised at the trial.¹⁸

The requirement of time allegations applies to all cases, while only a small percentage involves any contention that the statute of limitations has run. Hence it is not likely that the requirement has been much motivated by the desire to facilitate disposition of litigation upon the ground of limitations. It is perhaps more accurate to say that pretrial disposition of limitation cases is a by-product of the time allegation rule.¹⁹ But it is an important by-product since the time allegation in the complaint is a *sine quo non* of raising the statute of limitations by the demurrer or the demurrer-type motion, and it is of considerable, though less, importance in connection with employment of summary judgment or speaking motion procedures to dispose of cases on the ground that the action is barred by lapse of time.

(2) Demurrer

When the plaintiff's initial pleading shows that his cause of action accrued beyond the applicable limitation period, should it be demurrable? Objections to raising the statute of limitations by demurrer have been three in number.²⁰ One is that the bar will not appear for purposes of a demurrer since the date of the commencement of the action is not apparent on the face of the plaintiff's pleading. This is a highly technical viewpoint. In states in which an action is commenced by the filing of the complaint the date of commencement appears from the official file mark on the back; in any case a court should take judicial notice of the date of commencement in the very action. A recent West Virginia case shows that this objection may be overcome by grantingoyer of the writ upon request of the demurring defendant.²¹

235 Mich. 315, 209 N.W. 58 (1926); see also *Independent Life Ins. Co. v. Downey*, 255 Ky. 95, 72 S.W. 2d 1008 (1934) (error to refuse amendment to conform with proof of date).

¹⁷ *Life & Casualty Ins. Co. of Tennessee v. Latham*, 255 Ala. 160, 50 So. 2d 727 (1951); see note 13. *supra*.

¹⁸ Note, 35 YALE L.J. 487, 494 (1926).

¹⁹ *But cf. Frederick O. Muller Inc. v. Dun & Bradstreet, Inc.*, 4 F.R. Serv. 169 (S.D. N.Y. 1940) where motion to make more definite was sustained to an allegation of publication of libel on a certain date "and at various other times" when the specified date was beyond the statutory period; and see *Miller v. Brown*, 107 Cal. App. 2d 304, 237 P. 2d 320 (1951).

²⁰ *Pleading*, *supra* note 1, at 919-922.

²¹ *Town of Clendenin v. Ledsome*, 129 W.Va. 388, 40 S.E. 2d 849 (1946) (statutory action but time limitation contained exceptions). *Cf. Goldschmidt v. Pevely Dairy Co.*, 341 Mo. 982, 111 S.W. 2d 1 (1937) (may look to filing date on complaint). *But see Howard v. Waale—Complan & Tiberti*, 67 Nev. 304, 217 P. 2d 872 (1950).

The second objection is that allegations of time are "immaterial" and hence they are not sufficiently established or admitted to test the matter of bar on the demurrer. This again is a misapplied technicality. Allegations of time are said to be immaterial in order to permit proof of a date other than that alleged without a fatal variance.²² When the plaintiff pleads a date of accrual of his claim and persists in that allegation, it is fair to take him at his word in passing on his right to recover. This is the philosophy of Federal Rule 9 (f): "For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter."²³ A late Connecticut decision expresses the same philosophy.²⁴

The only substantial objection to raising the matter by demurrer is that the practice may prevent a plaintiff from showing that his case comes within some exception of the statute of limitation such as absence, incapacity, or concealment. This reason prompted the orthodox common law position that the point could not be raised by demurrer, at least when there was any possibility of exceptions. On the other hand the equity pleaders took the position that an apparently barred complainant must state the facts constituting exceptions to the statute in his original or amended bill; if he did not, a demurrer would be sustained when the pleading showed that the normal statutory period had elapsed.

Some code states follow the common law position,²⁵ others the equity view.²⁶ The matter is complicated by express statutory provisions in a number of the code jurisdictions. When there is express enumeration of the statute as a ground of demurrer there seems to be no alternative other than the equity position.²⁷ On the other hand some codes provide that the bar is waived unless pleaded in the answer. This has been thought

²² Note, 35 YALE L.J. 487, 489 (1926).

²³ See notes 35-37 *infra* and accompanying text.

²⁴ *Hitchcock v. Union & New Haven Trust Co.*, 134 Conn. 246, 56 A. 2d 655 (1947). But see *Quaker City Choc. & Con. Co. v. Delhi-Warnock Bldg. Ass'n*, 357 Pa. 307, 53 A. 2d 597 (1947).

²⁵ *Keilman v. City of Hammond*, 116 N.E. 2d 515 (Ind. App. 1953); *Batchelor v. Mitchell*, 238 N.C. 351, 78 S.E. 2d 240 (1953); *Woolery v. Smith*, 302 Ky. 725, 196 S.W. 2d 115 (1946).

²⁶ *Horrigan v. Quinlan*, 149 Neb. 538, 31 N.W. 2d 430 (1948); *Johanson v. Cudahy Packing Co.*, 107 Utah 114, 152 P. 2d 98 (1944). But a complaint that merely shows that the action may be barred is not demurrable. *Vassere v. Joerger*, 10 Cal. 2d 689, 76 P. 2d 656 (1938); cf. Note, 29 MICH. L. REV. 523 (1931); see also *Nevada—Douglas Consolidated C. Co. v. Berryhill*, 58 Nev. 261, 75 P. 2d 992 (1938) where the complaint showed that the defendant was a foreign corporation to whom the statute did not apply unless it had a resident agent; *Eastern Outfitting Co. v. Lamb*, 169 Wash. 480, 14 P. 2d 30 (1932) (error to refuse amendment to complaint after demurrer).

²⁷ *Price v. Kobacker Furniture Co.*, 25 Ohio App. 44, 158 N.E. 551 (1927); *Bergmann v. Puhl*, 195 Wis. 120, 217 N.W. 746 (1928).

by some courts to forbid the matter from being raised by demurrer,²⁸ although a more reasonable meaning attributable to such provisions is that they merely prevent the defendant from taking advantage of the bar under an answer which does not specifically raise the defense.²⁹

Where the statutory grounds of demurrer include time limitations it is normal to hold that the demurrer must be special and point out the particular limitation relied upon.³⁰ When the demurrer is sustained upon the ground that the complaint fails to state a cause of action if the complaint discloses the bar, it is usual to find that the demurrer need state only that general ground,³¹ although California persists in the anomalous position that the demurrer must designate the grounds of limitation as an added specification of the statutory ground of failure to state facts sufficient to constitute a cause of action.³²

In the demurrer states there has been little change in judicial attitude on the problem of whether the matter can be raised upon demurrer. Several scores of opinions have passed on the question, but few of them contain discussion of any consequence or of any new attitude. However, Connecticut may be receding from its position that the point cannot be raised by demurrer.³³

(3) Motion

The writer's recommendation that the pre-trial motion be accepted as a device for raising the bar of the statute of limitations³⁴ has received an enormous impetus from the Federal Rules. Motions based upon objections appearing on the face of the pleadings do not differ fundamentally from the demurrer, although the motion procedure should be freer from technicality than the common law machinery which it supplants. A number of early trial court decisions under the Federal Rules held that the demurrer-type motion could not be employed to raise the defense, since Rule 8 (c) lists the statute of limitations as one of the defenses

²⁸ *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320 (1952); *Bielenberg v. Higgins*, 85 Mont. 56, 277 Pac. 631 (1929).

²⁹ See text at notes 34-37, 57-62 *infra*.

³⁰ *Ricker v. Ricker*, 201 Ore. 416, 270 P. 2d 150 (1954) (recognizing general rule, but holding general demurrer sufficient in case of personal representative who was not permitted to waive the bar).

³¹ *Bradley v. Hall*, 165 Kan. 358, 194 P. 2d 943 (1948); *Howard v. Jeffrey*, 268 P. 2d 897 (Okla. 1954).

³² See *Ryan v. Welte*, 87 Cal. App. 2d 897, 198 P. 2d 357 (1948) for the strictness with which the rule is applied. However, the demurrer need not, as in case of the answer, specify the subdivision of the statute relied upon as a bar. *Bainbridge v. Stoner*, 16 Cal. 2d 423, 106 P. 2d 423 (1940); see also Note, 29 CALIF. L. REV. 210, 213-215 (1941).

³³ *Hitchcock v. Union & New Haven Trust Co.*, 134 Conn. 246, 56 A. 2d 655 (1947), note 16 *supra*, declares that a demurrer raises the point if the plaintiff joins in the demurrer; the earlier Connecticut cases indicated that the demurrer could never raise the general statute of limitations by demurrer. See also *Boardman v. Burlingame*, 123 Conn. 646, 197 Atl. 761 (1938).

³⁴ *Pleading*, *supra* note 1, at 929-933, 948.

which must be pleaded in the answer.³⁵ The mechanical argument is that since the defense must be pleaded it cannot be raised by motion to dismiss. This view point can now be regarded as thoroughly exploded, since there is higher authority in at least six circuits to the effect that Federal Rule 9 (f)³⁶ distinctly indicates that the timeliness of the action can be tested upon the basis of the pleading and that the motion to dismiss under Rule 12 upon the ground of "failure to state a claim" is an appropriate proceeding in which the matter can be raised.³⁷ While it is not clear whether the motion must expressly mention the ground of the statute of limitations,³⁸ the better view would seem to make this a requirement, especially in view of Federal Rule 7 (b) (1) which provides that motions "shall state with particularity the grounds therefor."³⁹

In Delaware⁴⁰ and Missouri,⁴¹ under provisions like those of the Federal Rules, it has been held that a motion to dismiss may be sustained when the plaintiff's pleading shows that the period fixed by the statute of limitations has elapsed. Unfortunately the highest courts of two other states have held to the contrary upon the same ground that motivated the early federal district court cases.⁴² Several other state courts have held that the motion to dismiss, apparently of the demurrer type, is a proper means of raising the objection.⁴³ In 1944 New York amended Civil

³⁵ *E.g.* *Baker v. Sisk*, 1 F.R.D. 232 (E.D. Okla. 1938); *Kraushaar v. Leschin*, 4 F.R.D. 143 (E.D. Pa. 1944).

³⁶ Set forth at note 23 *supra*.

³⁷ *Kincheloe v. Farmer*, 214 F. 2d 604 (7th Cir. 1954); *Taylor v. Houston*, 211 F. 2d 427 (D.C. Cir. 1954); *Suckow Borax Mines Consol. v. Borax Consolidated*, 185 F. 2d 196 (9th Cir. 1950); *Panhandle Eastern Pipe Line Co. v. Parish*, 168 F. 2d 238 (10th Cir. 1948); *Bricton v. Woodrough*, 164 F. 2d 107 (8th Cir. 1947). See text at note 29 *supra*. See also *Continental Colliers v. Shober*, 130 F. 2d 631, 635 (3rd Cir. 1942).

³⁸ In Federal Rules Form 19(1) the motion to dismiss on the ground of failure to state a claim makes no specification of the reason for the failure.

³⁹ See 3 F.R. Serv. 671 (1940); *Steingut v. National City Bank of New York*, 36 F. Supp. 486 (E.D. N.Y. 1941) (motion to remand).

⁴⁰ *Patterson v. Vincent*, 61 A. 2d 416 (Del. Super. Ct. 1948); see also *Feil v. Senisi*, 7 N.J.L. 517, 72 A. 2d 348 (Super. Ct. 1950).

⁴¹ *Granger v. Barber*, 361 Mo. 716, 236 S.W. 2d 293 (1951); *Bruun v. Katz Drug Co.*, 359 Mo. 334, 221 S.W. 2d 717 (1949); *Devault v. Truman*, 354 Mo. 1193, 194 S.W. 2d 29 (1946); see *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W. 2d 644 (1947).

⁴² *Smith v. Kent Oil Co.*, 128 Colo. 80, 261 P. 2d 149 (1953); *Proctor v. Schomberg*, 63 So. 2d 68 (Fla. 1953); *Akin v. City of Miami*, 65 So. 2d 54 (Fla. 1953). See text at note 35 *supra*. The Florida decisions are retrogressive since the defense could be raised by demurrer under the earlier practice. *Dee v. Southern Brewing Co.*, 146 Fla. 588, 1 So. 2d 562 (1941).

⁴³ *Wilson v. Tromly*, 401 Ill. 307, 89 N.E. 2d 22 (1949) (death action); *Harris v. Norwalk Trucking Co.*, 334 Ill. App. 82, 78 N.E. 2d 343 (1948) (personal injury); *Collins v. Richardson*, 168 Kan. 203, 212 P. 2d 302 (1949) (motion to strike); *Yeager v. Mellus*, 328 Mich. 243, 43 N.W. 2d 836 (1950). But see *Thomas v. McLean*, 365 Pa. 526, 76 A. 2d 413 (1950).

Practice Act Rule 107 so as to make it clear that a motion to dismiss is proper when the complaint discloses the bar. This change was necessary to remove the possibility, under the peculiar structure of Rules 106 and 107, that, while a motion supported by affidavit might theretofore raise the objection at the pretrial stage when the objection did not appear on the face of the complaint, the matter could be raised only by answer if the complaint disclosed that the action was barred.⁴⁴ Although the argument seems absurd there was adequate basis for it under the *lex scriptae* of New York prior to 1944.

While there are technical differences in obtaining judgment under the speaking motion and under the motion for summary judgment, there is no difference in end result. The substantial identity of these two procedures is demonstrated by the 1946 amendment to Federal Rule 12(b), declaring that when matters outside the pleadings are presented upon motion to dismiss and not excluded by the court, the motion shall be treated as one for summary judgment.⁴⁵ To warrant the grant of judgment on pretrial motion upon grounds not appearing in the opponent's pleading, it is necessary that the grounds appear "without substantial controversy."⁴⁶ Typically the motion is based upon the moving party's affidavits which are not adequately answered by the opponent, although under Federal Rule 56(a) pleadings, depositions and admissions on file may also be considered, and the use of testimony is not forbidden.

Of course motion for summary judgment should not be granted if there is a material issue of fact with regard to the ground of the motion. While statistical data are lacking, there is reason to believe that in the majority of cases there is no real dispute of fact as to the existence of the bar, and that the only question is whether the defendant chooses to raise the defense and has done so in the proper manner. The relevant fact matters are often established by record,⁴⁷ or are such that do not permit real dispute. Serious controversies sometimes arise out of questions of law, such as what section of the statute applies to the case,⁴⁸ the manner of computation of the period,⁴⁹ and the applicability of exceptions to the plaintiff's case. Questions of law—even serious questions—can be determined upon motion for summary judgment. It is a mistake to believe that the court's decision on the motion must be hurried; indeed legal problems may receive more detached consideration at the motion stage than if the point must be decided in the hurry of the trial.

⁴⁴ See Tenth Annual Report, Judicial Council of New York 320-322 (1944).

⁴⁵ Cf. *Butcher v. United Electric Coal Co.*, 174 F. 2d 1003 (7th Cir. 1949); *Latta v. Western Inv. Co.*, 173 F. 2d 99 (9th Cir. 1949); CLARK, CODE PLEADING 542-545 (1947).

⁴⁶ FED. R. CIR. P. 56(d); cf. N.Y. Rules of Civil Practice, Rule 113.

⁴⁷ See *First Nat. Bank v. American Surety Co.*, 239 App. Div. 282, 267 N.Y. Supp. 565 (1933) (summons).

⁴⁸ *Kraushaar v. Leschin*, 4 F.R.D. 143 (E.D. Pa. 1944).

⁴⁹ See annotation, 20 A.L.R. 2d 1249 (1951).

In by far the majority of federal appellate cases wherein summary judgment was granted below on the ground of limitations, the decision was affirmed.⁵⁰ The paucity of state decisions,⁵¹ except in New York,⁵² may be due in part to the fact that in many jurisdictions summary judgment is either entirely unavailable or may be had in only limited classes of cases.⁵³ The New York decisions indicate a judicial willingness to grant the speaking motion or summary judgment when it is clear that the action is barred.⁵⁴ However, the highest court of that state has given an appropriate warning by its reversal of a summary judgment granted on the basis of the statutory bar when there was doubt as to when the transactions occurred.⁵⁵ A number of trial court decisions correctly deny judgment when the papers disclose some issuable question of fact with reference to the alleged bar.⁵⁶ Many cases in which there is ultimate disposition on the ground that the action is barred cannot be disposed of by summary judgment procedure, but there are a substantial number where this is possible. In the latter the motion is the speediest, most efficient manner of case disposition.

⁵⁰ Reynolds v. Needle, 77 App. D.C. 53, 132 F. 2d 161 (1942); Harris Stanley Coal & Land Co., v. Chesapeake & O. Ry. Co. 154 F. 2d 450 (6th Cir. 1946); Deer v. New York Cent. R. Co., 202 F. 2d 625 (7th Cir. 1953); Burns v. Chicago M., St. P. & P. R. Co., 192 F. 2d 472 (8th Cir. 1951); Kithcart v. Metropolitan Life Ins. Co., 150 F. 2d 997 (8th Cir. 1945); Gifford v. Travelers Protective Ass'n, 153 F. 2d 209 (9th Cir. 1946). *But see* Begnaud v. White, 170 F. 2d 323 (6th Cir. 1948) and *cf.* cases cited note 45 *supra*.

⁵¹ See Guaranty Mortgage & Security Co. v. City of Chicago, 328 Ill. App. 276, 65 N.E. 2d 632 (1946); Note, 1949 U. OF ILL. LAW FORUM 170.

⁵² See note 54 *infra*. Summary judgment proper is limited to contract actions or those to recover a chattel or damages for taking or detention thereof, or where the defense is based upon documentary evidence. New York Rules of Civil Procedure, Rule 113. But the speaking motion is permitted in any action upon the ground that the action is barred by limitations. *Id.* Rule 107(5).

⁵³ See VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 219-220 (1949).

⁵⁴ Trans America Development Corp. v. Leon, 279 App. Div. 189, 108 N.Y.S. 2d 769 (1951) (partial judgment); Sacco v. Rocco, 277 App. Div. 1012, 100 N.Y.S. 2d 367 (1950) (no payments); Ripley v. International Railways of Cent. America, 276 App. Div. 1006, 95 N.Y.S. 2d 871 (1950) (partial judgment); Corash v. Texas Co., 264 App. Div. 292, 35 N.Y.S. 2d 334 (1942) (against vague claim of exceptions); Loehr v. East Side Omnibus Corporation, 259 App. Div. 200, 18 N.Y.S. 2d 529 (1940) (question of law as to which statute applicable decided); Arnstein v. Crestview Music Corporation, 88 N.Y.S. 2d 175 (1949) (newspaper libel).

⁵⁵ Coane v. American Distilling Co., 298 N.Y. 197, 81 N.E. 2d 87 (1948).

⁵⁶ Rabinovitch v. Auerbach, 200 Misc. 77, 100 N.Y.S. 2d 923 (1950) (tolling by absence); Nervick v. Fine, 195 Misc. 464, 87 N.Y.S. 2d 534 (1949) (when cause for malpractice accrued); Gigerich v. Ronkonkoma Realty Corporation, 69 N.Y.S. 2d 228 (1947) (part payment—interest); De Young v. Coady, 64 N.Y.S. 2d 527 (1946) (discovery of fraud); Press v. Draper, 139 Misc. 263, 247 N.Y. Supp. 156 (1930) (reasonable time to perform promise of marriage). See also Jones v. 416 Pleasant Ave. Holding Corporation, 90 N.Y.S. 2d 92 (1949) (doubt as to nature of plaintiff's cause); Cannella v. Cannella, 80 N.Y.S. 2d 459 (1948) (denied in dis-

(4) *Answer*

Many recent opinions reiterate the orthodox proposition that when the defense of the general statute of limitations cannot be or is not taken by demurrer, it must be asserted by plea or answer or is deemed waived,⁵⁷ although a few decisions deny this in the case of equitable causes.⁵⁸ The general rule has been held to apply even though the plaintiff's pleading was demurrable on the ground of limitations.⁵⁹ Indeed it is held in some states that failure to demur to a complaint showing the action was barred is a waiver of the defense and that it is too late to raise the point by answer,⁶⁰ although other cases deny this.⁶¹

It is generally agreed that the defense of the general statute is not asserted by general denial.⁶² It is neither necessary nor proper to deny the date of accrual alleged in the complaint, or to set up the true date thereof, or the date of commencement of the action.⁶³ The form of answer indicated by the Advisory Committee for use under the Federal Rules is: "The right of action set forth in the complaint did not accrue within six years before commencement of this action."⁶⁴ This is substantially that of the common law pleaders⁶⁵ and has recognition in a number of state court decisions.⁶⁶ It is not sufficient to state that the "cause of action did not accrue within the past two years," since "past" refers to the time of the answer rather than to the date of the commence-

cretion); *Safrin v. Friedman*, 277 App. Div. 1138, 101 N.Y.S. 2d 216 (1950) (partial judgment denied in discretion when remainder of claim was not barred).

⁵⁷ *E.g.*, *Mulligan v. Hilton*, 305 Mass. 5, 24 N.E. 2d 676 (1940); *Dunning v. Dunning*, 300 N.Y. 341, 90 N.E. 2d 884 (1950); *Venmex Oil Co. v. Thomas*, 189 Okla. 407, 117 P. 2d 540 (1941); *Stryker v. Rasch*, 57 Wyo. 34, 113 P. 2d 963 (1941).

⁵⁸ *Roberts v. Burgett*, 209 Ark. 536, 191 S.W. 2d 579 (1946).

⁵⁹ *Miller v. Parker*, 128 Cal. App. 2d 775, 18 P. 2d 89 (1933); *Landers Lumber Co. v. Short*, 81 S.W. 2d 375 (Mo. App. 1935) (particularly must be pleaded when petition discloses the bar); *Venmex Oil Co. v. Thomas*, 189 Okla. 407, 117 P. 2d 540 (1941); but *cf.* *Eisler v. Tumo*, 93 Ind. App. 521, 176 N.E. 862 (1931).

⁶⁰ See *State v. Nolte*, 350 Mo. 271, 165 S.W. 2d 632 (1942); *Eastern Outfitting Co. v. Lamb*, 169 Wash. 480, 14 P. 2d 30 (1932); *Eastman v. Crary*, 131 Ore. 694, 284 Pac. 280 (1930); *Cornelison v. United States Building & Loan Ass'n*, 50 Idaho 1, 292 Pac. 243 (1930).

⁶¹ *D. A. Foley & Co. v. State*, 119 Cal. App. 300, 6 P. 2d 283 (1931); *Conklin v. Towne*, 204 Iowa 916, 216 N.W. 264 (1927).

⁶² *Murray v. De Luxe Motor Stages of Illinois*, 133 S.W. 2d 1074 (Mo. App. 1939); *Crayton v. Phillips*, 4 S.W. 2d 961 (Tex. Com. App. 1928) (general issue). But see *Evans v. Zeigler*, 91 Cal. App. 2d 226, 204 P. 2d 902 (1949) indicating that the statute is raised by general denial to complaint consisting of the common counts.

⁶³ See *Schoolfield v. Second Dist. No. 1 in Custer County*, 101 Colo. 56, 70 P. 2d 353 (1937); *Norwood v. Eastern Oregon Land Co.*, 139 Ore. 25, 5 P. 2d 1057, 7 P. 2d 996 (1932). *Cf.* *Shield v. Brown*, 166 Va. 596, 186 S.E. 33 (1936). See *Pleading*, *Supra* note 1, at 943.

⁶⁴ *FED. R. CIV. P. Form 20 (4)*.

⁶⁵ *Pleading*, *supra* note 1, at 938-939.

⁶⁶ See cases cited note 63 *supra*.

ment of the action.⁶⁷ In a few jurisdictions, under the influence of statutory provisions, the answer must contain explicit reference to the applicable limitation.⁶⁸ Here the defendant must literally plead the statute. This is a departure from our general philosophy that it is unnecessary to plead law.

(5) *Amendments to Answer*

The question of waivability by failure to raise the defense in the answer becomes acute in the cases where the defendant seeks to insert the matter by amendment to his answer, particularly after the trial has begun. Should this be permitted? There is no easy answer to this question either on the basis of the authorities or upon considerations of justice. Several variations of an old lawyer's tale will serve to point up the problem. The story concerns the defense against a substantial claim, part of which was clearly barred by limitation; counsel expressly waived this defense by his pleading and was able to inform the jury of the waiver with the anticipated result that this had such a profound psychological effect upon the lay gents that they decided for defendant upon the basis of a more dubious defense which was applicable to the plaintiff's entire claim. By way of alteration of the story, let us assume that at the trial the second defense fell entirely flat. In that event may the defendant take advantage of the statute of limitations at this late date? Surely not by motion for directed verdict without a chance for the plaintiff to controvert or avoid the bar. The defense of the statute of limitations is peculiar in that the bar will very likely appear from the evidence although the point is not being consciously litigated. Obviously the defendant cannot swoop down and take a directed verdict just because the dates shown in evidence in the course of natural narration disclose that the action was apparently commenced too late, without giving the plaintiff full opportunity to show that the action was not actually barred.

Further varying the facts, suppose that midway of the trial defendant asked for an amendment of his answer setting up the statute as a defense, should the amendment be allowed in order to permit litigation of the question? It is likely that the plaintiff may not then be ready upon the law and the facts of the defense, even if he has adequately prepared his case. He would be justified in the belief that the point had been waived and that he was not expected to respond to the statute. Even if he is ready, or if a continuance is granted to permit him to prepare, should our imaginary defendant and his counsel be permitted to throw off the consequences of their grandstanding where it appears to be unsuccessful?

A third variation is closer to the heart of the problem. Suppose there was no express waiver of the defense of the statute of limitations and no

⁶⁷ *Green v. Proctor & Gamble Distributing Co.*, 92 Fla. 396, 109 So. 471 (1926).

⁶⁸ *Dawson v. McNaney*, 71 Ariz. 79, 223 P. 2d 907 (1950); *Davenport v. Stratton*, 24 Cal. 2d 232, 149 P. 2d 4 (1944) (must plead subdivision of section).

attempt to gain psychological advantage by refraining from raising the point, but the failure to plead the statute was due to the fact that counsel had been in error as to the applicable limitation period, or simply that the defense had not occurred to him. Should the defendant be entitled to raise the point by actual amendment or by asserting the defense without an amendment?

Federal Rule 15 provides that a party may amend with leave and "leave shall be freely given when justice so requires." The district court decisions indicate that permission to add the statute of limitations to the defenses already pleaded in the answer is freely given.⁶⁹ As a whole the recent state court decisions indicate that the matter of adding the defense to the answer is a matter of the trial court's discretion; most of the cases fall in the category of affirmance of the trial court's allowance of the amendment.⁷⁰ Other decisions affirm the trial court's denial of the amendment.⁷¹ The Supreme Court of California reversed when the trial court denied the amendment as a matter of law; it was declared that discretion should have been exercised.⁷² A few cases declare that it was error for the trial court to deny the amendment.⁷³ Apparently only

⁶⁹ *Emich Motors Corp. v. General Motors Corp.*, 15 F.R.D. 354 (N.D. Ill. 1953) (allowed on second trial when case law had changed); *Di Trapani v. M. A. Henry Co.*, 7 F.R.D. 123 (S.D. N.Y. 1946); *Cornell v. Chase Brass & Copper Co.*, 48 F. Supp. 979 (S.D. N.Y. 1943) (after amendment of plaintiff's pleading); *Downey v. Palmer*, 27 F. Supp. 993 (S.D. N.Y. 1939) (error as to statute first pleaded). But *cf. Vant Sant v. American Express Co.*, 169 F. 2d 355 (3rd Cir. 1948) (amendment denied by appellate court on reversal). See also *Haskins v. Roseberry*, 119 F. 2d 803 (9th Cir. 1941) where the unpleaded defense was tried with the implied consent of the parties; *cf. Goodwin v. Townsend*, 197 F. 2d 970 (3rd Cir. 1952) (amendment unnecessary in statutory action).

⁷⁰ *Pettigrew v. Pettigrew*, 172 Ark. 647, 291 S.W. 90 (1927) (after complaint was amended); *Wrightson v. Dougherty*, 5 Cal. 2d 257, 54 P. 2d 13 (1936); *Flanders v. Kochenberger*, 118 Colo. 104, 193 P. 2d 281 (1948) (after issue joined and before trial); *Saunders v. Cresswell Roll Forming Co.*, 83 A. 2d 697 (Del. Super. 1951); *Conklin v. Towne*, 204 Iowa 916, 216 N.W. 264 (1927) (after plaintiff's evidence disclosed bar); *Conley v. Conley*, 307 Ky. 429, 211 S.W. 2d 401 (1948) (one year after evidence closed but before judgment); *Lau v. Pontiac Commercial & Savings Bank*, 260 Mich. 73, 244 N.W. 233 (1932); *Haney v. Thomson*, 339 Mo. 505, 98 S.W. 2d 639 (1936); *F. M. Slagle & Co. v. Bushnell*, 70 S.D. 250, 16 N.W. 2d 914 (1944) (after taking testimony); *McTaggart v. Texas Bitulithic Co.*, 132 S.W. 2d 436 (Tex. Civ. App. 1939); *Walker v. Sieg*, 23 Wash. 2d 552, 161 P. 2d 542 (1945); *Haueter v. Budlow*, 256 Wis. 561, 42 N.W. 2d 261 (1950). See also *Levi v. Sackerman*, 131 Misc. 40, 225 N.Y. Supp. 658 (1927); *Festa v. Schuman Bros.*, 87 D. & C. 152 (Pa. C.P. 1953).

⁷¹ *Overton v. White*, 18 Cal. App. 2d 567, 64 P. 2d 758 (1937) (original answer pleaded wrong subdivision); *Murray v. De Luxe Motor Stages of Illinois*, 133 S.W. 2d 1074 (Mo. App. 1939); *Ayuso v. Lane Foods*, 279 App. Div. 613, 107 N.Y.S. 2d 718 (1951) (after first trial); *Vermillion v. Haynes*, 211 S.W. 2d 781 (Tex. Civ. App. 1948).

⁷² *Davenport v. Stratton*, 24 Cal. 2d 232, 149 P. 2d 4 (1944).

⁷³ *Wyrick v. Wyrick*, 243 S.W. 2d 1004 (Ky. 1951); *Butke v. Nachschoen*, 132 Neb. 514, 272 N.W. 326 (1937); *Levin v. Levin*, 246 App. Div. 783, (1935)

Maryland takes the flat position that the bar cannot be asserted by amendment.⁷⁴

It is a fair summary of the cases cited in the last paragraph that the courts commonly allow the plea of the statute of limitations to be added by amendment, frequently at late stages, and usually without much discussion. One would expect that the amendment should be allowed where the nature of the plaintiff's claim was not fully indicated by his pleading, when the defendant was misled by plaintiff's allegations of incorrect dates, when the defense was defectively set forth in the original answer, or even if the latter relied on an inapplicable statutory period. But the cases go beyond these situations and allow a late assertion of the defense without inquiry into the considerations existing in the particular case.

Presumably trial court discretion and appellate court control should be tempered by the judicial attitude of favor, disfavor, or neutrality toward the defense sought to be injected by amendment. Courts may affectuate their prejudices toward causes of action or defenses by application of appropriate procedural handicaps. Allocation of burden of proof is perhaps the most prominent example of this.⁷⁵ Easy waivability of a defense by denial of the right to amend is another.⁷⁶

What is the judicial attitude toward the defense of the statute of limitations? If one judges by what the courts say in this⁷⁷ and other

(three years delay); *Tribulas v. Continental Equitable Title & Trust Co.*, 331 Pa. 283, 200 Atl. 659 (1938); see *Horse Creek Conservation Dist. v. Lincoln Land Co.*, 54 Wyo. 1042, 92 P. 2d 572 (1939) where existence of the bar did not become apparent until the trial.

⁷⁴ *Lichtenberg v. Joyce*, 183 Md. 689, 39 A. 2d 789 (1944) (based on code provision).

⁷⁵ See text at 79 *infra* et seq.

⁷⁶ Problems connected with the right to amend the complaint after statute of limitations has run present another opportunity for the courts to favor or disfavor the defense by a ruling of a procedural nature. A liberal attitude toward the allowance of such amendments manifested in *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U.S. 570 (1913) and *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62 (1933) is now manifested in *FED. R. Civ. P. 15(c)*. See *Tiller v. Atlantic Coast Line Railroad Co.*, 323 U.S. 574 (1945). The recent state decisions have indicated a similar liberality. *Wennerholm v. Stanford University School of Medicine*, 20 Cal. 2d 713, 128 P. 2d 522 (1942); *Griffin v. Workman*, 73 So. 2d 844 (Fla. 1954); *Metropolitan Trust Co. v. Bowman Dairy Co.*, 369 Ill. 222, 15 N.E. 2d 838 (1938); *Ross v. Robinson*, 174 Ore. 25, 147 P. 2d 204 (1944); *De Loach v. Greggs*, 222 S.C. 326, 72 S.E. 2d 647 (1952). But *cf. Webb v. Eggleston*, 228 N.C. 574, 46 S.E. 2d 700 (1948); *Parker v. Fies & Sons*, 243 Ala. 348, 10 So. 2d 13 (1942); *Harriss v. Tams*, 258 N.Y. 229, 179 N.E. 476 (1932); see also *Martin v. Hall*, 297 Ky. 537, 180 S.W. 2d 390 (1944). Many of these cases involve statutory actions, wherein less liberality may be expected than in cases of amendments after the statute of limitations has run. See text at note 103 *infra*. Generally see CLARK, CODE PLEADING 729-734 (1947); notes, 36 CORNELL L.Q. 569 (1951); 34 ILL. L. REV. 765 (1940); 22 IOWA L. REV. 128 (1936); 25 N.C. L. REV. 76 (1946); 7 OKLA. L. REV. 82 (1954); 29 TEXAS L. REV. 380 (1951); annotation, 8 A.L.R. 2d 6 (1949) (change of parties).

⁷⁷ Compare *Walker v. Sieg*, 23 Wash. 2d 552, 161 P. 2d 542 (1945) (like any

connections there is a hopeless conflict of viewpoint. The best test of their stand is the courts' doings rather than their sayings. By this yardstick the decisions permitting the statute of limitations to be asserted by amendment to the answer certainly do not disfavor the defense, although it is hard to say whether the position is one of neutrality or of favor. Fortunately the defense is not favored to the extent of allowing the court to assert it *ex mero motu*.⁷⁸

The writer questions the judicial attitude toward the defense of the statute of limitations as indicated by the results of the amendment decisions, and further regrets the *sub silentio* character of the manifestation. This concern is based on ethical considerations. The underlying reasons for enactment of the statutes of limitations are: (1) to require litigation to be initiated when the evidence is fairly fresh, (2) to protect one against a stale claim when he has shaped his affairs upon the basis that non-assertion for a long time indicates that the matter will never be pressed. Of course when one asserts the defense of the statute in a proper and timely manner, there is no occasion for inquiry into the matter of whether these bases of policy are applicable to the defendant's situation. However, there are certainly cases where they do not apply, *e.g.* those in which the evidence is documentary and the claimant has been constantly pressing for payment or settlement. The defense of time limitations does not have the same universal righteousness as self defense, payment, absence of operative facts necessary to constitute the plaintiff's claim, or even such matters as contributory negligence or failure of consideration. It may be just to allow the assertion of these matters at a fairly late stage of the action, even though failure to raise them sooner was caused by defendant's inattention or initial decision to abandon them. But is it not reasonable to assume that a defendant, who is duly apprised of plaintiff's claim and to whom the reasons of policy underlying the protection given by the statute of limitations are applicable, would plead the bar in the first instance unless he wished to waive the defense? Is it not fair to insist on timeliness of assertion, or a good excuse for delay, in order to permit reliance upon a ground which may or may not have an ethical basis? It seems to the writer that these questions should be answered in the affirmative, and that hence the courts should deny applications for amendments interjecting the statute, unless it is shown that plaintiff's pleadings somehow misled the defendant or that the defendant is ethically entitled to the defense because of loss or impairment of evidence or change of his situation due to his reliance upon the delay in bringing the action.

other defense); *Van Diest v. Towle*, 116 Colo. 204, 179 P. 2d 984 (1947) (favored); *Lichtenberg v. Joyce*, 183 Md. 689, 39 A. 2d 789 (1944) (disfavored); *Howard v. Waale-Camplan & Tiberti*, 67 Nev. 304, 217 P. 2d 872 (1950) (no presumption in its favor).

⁷⁸ See *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 275 N.W. 694 (1937).

(6) *Burden of Proof*

The prevailing view⁷⁹ that the risk of non-persuasion is upon the defendant to show that the action is barred by the statute of limitations continues to be general, and if anything to gain ground. Michigan is apparently a recruit to the majority ranks.⁸⁰ Acceptance of the orthodox position is now said to be well settled in Arkansas.⁸¹ However, the Massachusetts⁸² and North Carolina⁸³ cases adhere to their viewpoint that when the defense is properly pleaded the burden is upon the plaintiff to show that his action was brought in time.

The foregoing applies only to the simple issue as to the lapse of the normal statutory period. When the question is whether the statutory period has been extended by such matters as part payment, new promise, or fraudulent concealment, the traditional view⁸⁴ is that the burden of proof is upon the plaintiff to show that he comes within these exceptions.⁸⁵ Here again the current holdings follow the old path. This position jibes with the handling of these exceptions in the law of pleading.⁸⁶ It is also true that the facts concerning these exceptions are principally or at least equally within the knowledge of the plaintiff. This is not true with regard to provisions tolling the statute while the defendant was absent from the state. Recent cases shoulder the defendant with the burden of proof as to such matters.⁸⁷ This seems a reasonable exception to an exception.

ADVERSE POSSESSION

The traditional view that a plaintiff who relies upon adverse possession for the statutory period may plead ownership generally and sustain the

⁷⁹ *Pleading*, *supra* note 1, at note 9. In *Pauley v. Salmon River Lumber Co.*, 74 Idaho 483, 264 P. 2d 466 (1953) the rule was applied although the complaint showed on its face that the action was barred. *In re Saladino*, 81 N.Y.S. 2d 503 (Surr. 1948) seems out of line with the prevailing rule in the holding that one seeking to establish a claim has the burden of showing that the instrument is under seal in order to avoid the limitation provisions as to unsealed instruments.

⁸⁰ *Turney v. City of Detroit, Department of Street Railways*, 316 Mich. 400, 25 N.W. 2d 571 (1947); *cf. Ayres v. Hubbard*, 71 Mich. 594, 40 N.W. 10 (1888).

⁸¹ *McCrite v. Hendrix College*, 198 Ark. 1149, 133 S.W. 2d 31 (1939).

⁸² *Chandler v. Dunlop*, 311 Mass. 1, 39 N.E. 2d 969 (1942).

⁸³ *Jennings v. Morehead City*, 226 N.C. 606, 39 S.E. 2d 610 (1946).

⁸⁴ *Pleading*, *supra* note 1, at note 9.

⁸⁵ *Cole v. Hartford Accident & Indemnity Co.*, 242 Iowa 416, 46 N.W. 2d 811 (1951) (concealment); *Cadena v. Cadena*, 223 S.W. 2d 678 (Tex. Civ. App. 1949) (duration of delay); *Kuteman v. Alexander*, 201 S.W. 2d 73 (Tex. Civ. App. 1947) (new promise); *Wickwire v. Reard*, 37 Wash. 2d 748, 226 P. 2d 192 (1951) (voluntary payment); see also *Woods v. Sanders*, 247 Ala. 492, 25 So. 2d 141 (1946).

⁸⁶ *Pleading*, *supra* note 1, at 921.

⁸⁷ *Banister v. Solomon*, 126 F. 2d 740 (2d Cir. 1942); *Haimes v. Schonwit*, 268 App. Div. 652, 52 N.Y.S. 2d 272 (1945); *Rabinovitch v. Auerbach*, 100 N.Y.S. 2d 923 (Sup. Ct. 1950) (non-resident defendant); *In re Seitz*, 31 D.&C. 74 (Pa. C.P. 1937); *Bethel Mills v. Whitcomb*, 116 Vt. 357, 76 A. 2d 548 (1950) (to show existence of property within state).

allegation by proof of facts establishing the adverse possession is reiterated in several recent cases,⁸⁸ although others seem to require allegation of the specific facts which are necessary to establish title by this means.⁸⁹ The latter may be considered as indications of a judicial desire to handicap a plaintiff who asserts title by this means. However, unless the allocation of the burden of proof⁹⁰ is considered to be an instance, most courts have not imposed procedural handicaps upon the one claiming by adverse possession. For example, the prevailing rule permits him to have the cloud of the record title removed in an equity suit.⁹¹ The orthodox view is tied to the title concept which is a convenient one in the law of pleading, particularly in the modern systems. Courts which have adhered to this position are not likely to waver, even if some strong reason could be asserted for the change.

When the defendant in an action to recover land relies upon title by adverse possession, a number of recent cases sustain the prevailing view that any answer which puts plaintiff's title in issue is sufficient to enable defendant to prove his defense.⁹² There are, however, a few decisions to the contrary.⁹³ The proposition seems to be a corollary of that discussed in the preceding paragraph: if the plaintiff may show title by adverse possession under his general allegation of ownership, the defendant should be permitted to show his adverse possession under a denial of plaintiff's title. However, in Kentucky it seems that defendant must plead adverse possession specifically although plaintiff need not.⁹⁴ Where statutes or court rules enumerate the defense of the statute of limitations as one

⁸⁸ *Merrill v. Hooper*, 125 Cal. App. 80, 13 P. 2d 786 (1932); *Bryant v. Bullock*, 309 Ky. 590, 218 S.W. 2d 381 (1949); *Gubser v. Town*, 273 P. 2d 430 (Ore. 1954). *But cf.* *Reeves v. Porta*, 173 Ore. 147, 144 P. 2d 493 (1944).

⁸⁹ *Hauber v. Gentry*, 215 S.W. 2d 754 (Mo. 1948); *Bixby v. Backues*, 346 Mo. 955, 144 S.W. 2d 112 (1940). A similar rule exists in Texas. *Merriman v. Lary*, 196 S.W. 2d 652 (Tex. Civ. App. 1946); *Buvens v. Brown*, 290 S.W. 1086 (Tex. Com. App. 1927).

⁹⁰ See text at notes 97-102 *infra*.

⁹¹ *Withroder v. Wiederoder*, 156 Kan. 570, 134 P. 2d 381 (1943); *Broome v. Jackson*, 193 Miss. 66, 7 So. 2d 829, 8 So. 2d 245 (1942); see annotation, 78 A.L.R. 24 at 110.

⁹² *Guy v. Lancaster*, 250 Ala. 226, 34 So. 2d 10 (1948) (sufficiency of special pleas immaterial when defendant also pleaded not guilty); *Culverhouse v. Glenn*, 247 Ala. 622, 25 So. 2d 719 (1946); *Hub Bel Air, Inc. v. Hirsch*, 203 Md. 637, 102 A. 2d 550 (1954); *Courtner v. Putnam*, 325 Mo. 924, 30 S.W. 2d 126 (1930) (general denial); *Wilberforce University v. College of Education*, 86 Ohio App. 121, 90 N.E. 2d 172 (1948) (same); *Morris v. Nelson*, 136 W.Va. 722, 68 S.E. 2d 9 (1951) (statute). See also *Anderson v. Village Homebuilders*, 401 Ill. 60, 81 N.E. 2d 430 (1948) (quiet title), noted in U. of ILL. L. FORUM 170 (1949).

⁹³ *Wooten v. Ratliff*, 306 Ky. 187, 206 S.W. 2d 830 (1947) (action to enjoin trespass); *Jones v. Moseley*, 29 Tenn. App. 559, 198 S.W. 2d 652 (1946) (equity suit).

⁹⁴ See *Wooten v. Ratliff*, note 93 *supra* and compare cases cited in note 88 *supra*.

which must be set up in the answer,⁹⁵ prudent counsel for a defendant claiming title by adverse possession would not rely upon his denial of plaintiff's title as sufficient basis for introduction of evidence of the defense. However, this point does not seem to have been adjudged under the Federal Rules or state procedures having similar provisions.⁹⁶

In general the recent cases dealing with the burden of proof, in the sense of risk of non-persuasion, are quite uniform in declaring that the burden is upon the person asserting title to land by adverse possession, whether he be the plaintiff or the defendant.⁹⁷ The same rule applies to personalty.⁹⁸ Some opinions are emphatic in their pronouncements.⁹⁹ It is frequently declared that the burden extends to all elements of title by adverse possession.¹⁰⁰ However, in particular cases a presumption as to the adverse nature of the claim is sometimes indulged in favor of the claimant.¹⁰¹ In addition, the burden of going forward may, in certain states of the proof, be shifted to the opponents.¹⁰²

⁹⁵ See text at notes 23, 28, 35-37, 40-42, 62-63 *supra*.

⁹⁶ Cf. *Haskins v. Roseberry*, 119 F. 2d 803 (9th Cir. 1941); see cases cited note 93 *supra*.

⁹⁷ The following are representative of the many cases on this point. *Labarre v. Rateau*, 210 La. 34, 26 So. 2d 279 (1946); *Louis Sachs & Sons v. Ward*, 182 Md. 835, 35 A. 2d 161 (1943) (injunction against trespass); *Simpson v. Sheridan*, 231 Minn. 118, 42 N.W. 2d 402 (1950) (boundary dispute); *Warren v. Warren*, 261 P. 2d 364 (Mont. 1953); *Thomas v. Hipp*, 223 N.C. 515, 27 S.E. 2d 528 (1943); *Grandin v. Gardiner*, 63 N.W. 2d 128 (N.D. 1954). See also cases cited notes 99, 100 *infra*.

⁹⁸ *Redmond v. New Jersey Historical Society*, 132 N.J.Eq. 464, 28 A. 2d 189 (1942).

⁹⁹ *Duke v. Harden*, 259 Ala. 398, 66 So. 2d 899 (1953) (very strict burden); *Thomas v. Durchslag*, 404 Ill. 581, 90 N.E. 2d 200 (1950) (clear, positive and unequivocal proof); *Village of Newport v. Taylor*, 225 Minn. 299, 30 N.W. 2d 588 (1948) (similar); *Wilcox v. Wickizer*, 266 P. 2d 638 (Okla. 1954) (similar); *Redmond v. New Jersey Historical Society*, note 98 *supra*.

¹⁰⁰ *Clark v. Stotts*, 274 P. 2d 172 (Cal. App. 1954); *Holmes v. Johnson*, 324 Mass. 450, 86 N.E. 2d 924 (1949); *Newport v. Taylor*, *supra* note 99; *Smith v. Cook*, 213 Miss. 876, 58 So. 2d 27 (1952); *Redmond v. New Jersey Historical Society*, note 98 *supra*; *Knight v. Hilton*, 224 S.C. 452, 79 S.E. 2d 871 (1954); *Brown v. Hubbard*, 42 Wash. 2d 867, 259 P. 2d 391 (1953).

¹⁰¹ *Hodge v. Terrill*, 123 Colo. 196, 228 P. 2d 984 (1951); *Lively v. Wick*, 122 Colo. 156, 221 P. 2d 374 (1950); *Suck v. Benton Township*, 66 N.W. 2d 434 (Iowa 1954); *Landers v. Thompson*, 356 Mo. 1169, 205 S.W. 2d 544 (1947) (to boundary fence); *Knotts v. Joiner*, 217 S.C. 105, 59 S.E. 2d 850 (1950) (unexplained possession); *Jefferies v. Benavides*, 220 S.W. 2d 712 (Tex. Civ. App. 1949).

¹⁰² *Faire v. Burke*, 363 Mo. 562, 252 S.W. 2d 289 (1952); *Tillman v. Hutcherson*, 348 Mo. 473, 154 S.W. 2d 104 (1941). The foregoing cases are based, in part at least, upon the presumption mentioned in the note 101 *supra*; cf. *Watson v. Ross*, 127 S.W. 2d 338 (Tex. Civ. App. 1939). See *Louis Sachs & Sons v. Ward*, 182 Md. 385, 35 A. 2d 161 (1943) where it was held in a suit to enjoin trespass that the original burden was on plaintiff to prove that defendants were trespassers, but when the latter claimed by adverse possession the burden shifted.

STATUTORY ACTIONS

When the action is of statutory origin and the legislation creating the right fixes the time limitation for bringing suit, the cases indicate somewhat different procedural treatment from that applied under the general statute. While failure to comply with the latter is regarded as a defense, observance of the limitation in statutory actions is usually regarded as a condition precedent to plaintiff's right.¹⁰³ In other words, timeliness is a part of his cause of action. Some opinions indicate that plaintiff should plead literally that his statutory action was commenced within the special period.¹⁰⁴ At least when the complaint discloses that the date of accrual of the cause of action was not within the permissible time, a demurrer or demurrer-type motion will be sustained.¹⁰⁵ Of course this follows *a fortiori* in the many jurisdictions which approve this manner of raising the general statute of limitations.¹⁰⁶ Even if the particular court requires a special demurrer to raise the defense of the general statute, it would seem that a demurrer for want of facts would be sufficient upon the condition precedent philosophy applied to the statutory action.¹⁰⁷ Since there are usually no exceptions to the normal bar in case of the statutory actions,¹⁰⁸ and since the possibility of exceptions is the only substantial ob-

See also *Stryker v. Rasch*, 57 Wyo. 34, 112 P. 2d 570, 113 P. 2d 963 (1941) (adverse possessor against mortgagee—burden on latter).

¹⁰³ *Peters v. Public Service Corporation*, 132 N.J.Eq. 500, 29 A. 2d 189 (1942) *aff'd* 133 N.J.Eq. 283, 31 A. 2d 809 (1943); *Sabol v. Pekoc*, 148 Ohio St. 545, 76 N.E. 2d 84 (1947); *Tillinghast v. Reed*, 70 R.I. 259, 38 A. 2d 782 (1944). See annotation, 67 A.L.R. 1070 (1930); see case note 105 *infra*. But see *Brookshire v. Burkhart*, 141 Okla. 1, 283 Pac. 571 (1929) (death action); also note 114 *infra*.

¹⁰⁴ *Callahan v. Chesapeake & O. Ry. Co.*, 40 F. Supp. 353 (E.D. Ky. 1941); *State for Use of Dunnigan v. Cobourn*, 171 Md. 23, 187 Atl. 881 (1936); *Hammond v. Southampton*, 77 N.Y. 2d 156 (1947). But see *Colyar v. Atlantic States Motor Lines*, 231 N.C. 318, 56 S.E. 2d 647 (1949); *Yablonsky v. City of New York*, 128 Misc. 469, 218 N.Y. Supp. 121 (1927).

¹⁰⁵ *A. G. Reeves Steel Const. Co. v. Weiss*, 119 F. 2d 472 (6th Cir. 1941); *Franzen v. Zimmerman*, 127 Colo. 381, 256 P. 2d 897 (1953); *Wilson v. Tromly*, 404 Ill. 307, 89 N.E. 2d 22 (1949); *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W. 2d 644 (1947); *Natseway v. Jojola*, 56 N.M. 793, 251 P. 2d 274 (1952); *Tollerson v. Atlantic Coast Line R. Co.*, 188 N.C. 67, 198 S.E. 164 (1938); *Sabol v. Pekoc*, note 103 *supra*; *Commonwealth v. McClane*, 154 Pa. Super. 246, 35 A. 2d 745 (1944); *Tillinghast v. Reed*, note 103 *supra*. See also *Bowles v. American Distilling Co.*, 62 F. Supp. 20 (S.D. N.Y. 1945) (ambiguous date); *Weese v. Weese*, 58 S.E. 2d 801 (W.Va. 1950). See also cases note 104 *supra* and annotation, 107 A.L.R. 1048 (1937). But see *Brookshire v. Burkhart*, note 103 *supra*.

¹⁰⁶ See text at 26, 37, 40-41 *supra*.

¹⁰⁷ See *Sabol v. Pekoc*, note 103 *supra*.

¹⁰⁸ *Wilson v. Tromly*, 404 Ill. 307, 89 N.E. 2d 22 (1949); *Berghuis v. Korthuis*, 228 Minn. 534, 37 N.W. 2d 809 (1949); *Peters v. Public Service Corporation*, note 103 *supra*; *Natseway v. Jojola*, 56 N.M. 793, 251 P. 2d 274 (1952). See *Sabol v. Pekoc*, note 103 *supra*. But see *Osbourne v. United States*, 164 F. 2d 767 (2d Cir. 1947) (denying general tolling provisions of state law but applying nonstatutory tolling in favor of one imprisoned by the enemy).

jection to assertion of time limitations by demurrer,¹⁰⁹ it is rational to permit the objection to be raised by demurrer in the statutory actions even if the jurisdiction denies this when the general statute is involved.

When the complaint contains a general allegation that the action was commenced in time, it probably follows that defendant's general or specific denial puts the matter in issue if plaintiff's allegation is regarded as part of his cause. There are apparently no cases holding that the general denial puts in issue the plaintiff's allegation of a date of accrual indicating timely commencement of the action; this position would certainly be at variance with orthodox pleading principles.¹¹⁰ However, the cases holding that the defendant can insist on the objection of time limitations in the statutory actions at the trial without raising it in any manner by his pleadings,¹¹¹ are even more surprising. Perhaps the matter is not of much consequence inasmuch as the defendant would probably be permitted to amend his answer so as to say whatever is necessary to put timeliness in issue. Since the courts are so free in allowing a belated plea of the general statute,¹¹² they would certainly be at least as liberal in allowing the defendant to amend in order to contest performance of a condition precedent to the plaintiff's claim.

In this connection it is interesting to speculate upon the situation where the plaintiff alleges generally the performance of all conditions precedent, as he is entitled to do in many jurisdictions. Presumably this allegation covers the timeliness of the statutory action. At least under the Federal Rules, the defendant must then deny performance specifically and with particularity in order to contest a condition precedent.¹¹³ Consequently the defendant would seem to be obliged to plead the lapse of time in practically the same manner as in case of the general statute, regardless of whether his objection comes within the list of defenses which Federal Rule 9 (c) declares must be affirmatively pleaded.¹¹⁴ The condition precedent category may well reverse the field as to the burden of pleading time limitations in the statutory actions if procedural rules are carried to their logical conclusions.

¹⁰⁹ See text following note 24 *supra*.

¹¹⁰ See text at 63 *supra*; also note 15 *supra*.

¹¹¹ *Goodwin v. Townsend*, 197 F. 2d 970 (3d Cir. 1952). *Werner v. United States*, 10 F.R.D. 245 (S.D. Cal. 1950); *Berry v. Heller*, 79 F. Supp. 476 (E.D. Pa. 1948) (court may raise of its own motion); *Model Land & Irrigation Co. v. Baca Irrigating Ditch Co.*, 83 Colo. 131, 262 Pac. 517 (1928); *Yablonsky v. City of New York*, 128 Misc. 469, 219 N.Y. Supp. 121 (1927); *Neely v. Minus*, 196 N.C. 345, 145 S.E. 771 (1928). See *John F. Jelke v. Smietanka*, 86 F. 2d 470 (7th Cir. 1936); *Goodwin v. Townsend*, 197 F. 2d 970 (3d Cir. 1952); *Deckert v. Burns*, 62 N.W. 2d 879 (S.D. 1954); *Peterson v. Union Pacific R. Co.*, 79 Utah 213, 8 P. 2d 627 (1932). But *cf. Sheeter v. Lifur*, 113 Cal. App. 2d 729, 249 P. 2d 336 (1952) (limitations contained in Revenue and Taxation Code).

¹¹² See notes 69-73 *supra* and accompanying text.

¹¹³ Federal Rule 9(c).

¹¹⁴ See text at notes 23, 35, 95-96 *supra*.

The decisions in the statutory actions cases reaffirm the traditional view placing the burden of proof as to timeliness of the action on the plaintiff.¹¹⁵ This is defensible if the statutory actions have been thus expressly disfavored by the legislature, or if the courts are justified in attaching this procedural handicap without legislative command. Wanting these elements there is no reason why this procedural burden should be placed upon the plaintiff just because the common law gave him no substantive right and the time limitation provision is contained in the statute creating that right. Why should the burden of proof on this issue be on the plaintiff in a statutory death action, but on the defendant in actions for personal injury, defamation or malicious prosecution?¹¹⁶

Probably the reader can sense the writer's feeling that this paper lacks the procedural breadth and interest of the latter's earlier study of the subject. In the main this is due to the fact that few recent relevant opinions have the sparkle and discernment which so often characterized the earlier cases. This, of course, is disappointing to a lover of the tradition and the art of pleading. On the other hand the last thirty years have seen considerable gains from the standpoint of practical law administration in this relatively small area. The very dearth of technical nicety concerning time limitations in their procedural aspects is indicative of the modern spirit of case disposition in the quickest and simplest possible manner—let procedure serve instead of govern. This spirit is manifested in specific provisions of the Federal Rules applicable to the problems here considered as well as in the general features of the Rules which apply equally to many other matters. Courts, federal and state, have employed the summary judgment and other motion procedures to the end of speedy disposition of barred claims.

There is one adverse reflection which goes beyond a nostalgic yearning for the days when the decisions contained keener discussions of procedural matters. It is the widespread judicial neglect of the opportunity to implement substantive policy regarding time limitations by means of decisions upon procedural points. This is particularly true with reference to the handling of the problem of amending the answer, and to the general implementation of procedure in the statutory actions. Due attention to the policy considerations in the latter would also have led to

¹¹⁵ *Melnik v. Perwak*, 295 Mass. 512, 4 N.E. 2d 329 (1936); *Knorp v. Thompson*, 352 Mo. 44, 175 S.W. 2d 889 (1943); *Neely v. Minus*, 196 N.C. 345, 145 S.E. 771 (1928). *But see* *Haas v. New York P. G. Medical School*, 131 Misc. 395, 226 N.Y. Supp. 617 (1928) asserting the New York rule that the limitation provision on death actions is of the same nature as those in the general statute of limitations; *cf.* *City of Houston v. Chapman*, 132 Tex. 443, 123 S.W. 2d 652 (1939); *Town of Oneida v. Hail*, 21 Tenn. App. 70, 105 S.W. 2d 121 (1937), where it did not appear whether or not the limitation was under the general statute.

¹¹⁶ *Pleading*, *supra* note, 1 at 937.

greater uniformity in the procedural treatment of time limitations generally—a desirable goal in itself although it is possible too late to attain this in the course of judicial, as distinguished from, legislative development.¹¹⁷

¹¹⁷ See Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157 (1927) indicating general absence of uniformity in the English law.